No. 12774, No. 12791, No. 12792, No. 12793, No. 12798, No. 12799, No. 12800, and No. 12802

UNITED STATES COURT OF APPEALS for the NINTH CIRCUIT

OREGON-WASHINGTON PLYWOOD COMPANY, *Petitioner*,
vs.
FEDERAL TRADE COMMISSION, *Respondent.*

WHEELER, OSGOOD CO., *Petitioner*,
vs.
FEDERAL TRADE COMMISSION, *Respondent.*

NORTHWEST DOOR COMPANY, *Petitioner*,
vs.
FEDERAL TRADE COMMISSION, *Respondent.*

WASHINGTON VENEER CORPORATION, *Petitioner*,
vs.
FEDERAL TRADE COMMISSION, *Respondent.*

DOUGLAS FIR PLYWOOD ASSOCIATION, *et al.*, *Petitioner*,
vs.
FEDERAL TRADE COMMISSION, *Respondent.*

PACIFIC MUTUAL DOOR COMPANY, *Petitioner*,
vs.
FEDERAL TRADE COMMISSION, *Respondent.*

WEST COAST PLYWOOD COMPANY, *Petitioner*,
vs.
FEDERAL TRADE COMMISSION, *Respondent.*

M. AND M. WOOD WORKING COMPANY, *Petitioner*,
vs.
FEDERAL TRADE COMMISSION, *Respondent.*

REPLY BRIEF FOR PETITIONER, WASHINGTON VENEER CORPORATION IN CAUSE No. 12793

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TABLE OF CASES

TEXTBOOKS

STATUTES

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Petitioner, Washington Veneer Corporation, presents a short reply memorandum directed to the brief for respondent, Federal Trade Commission. We feel that such reply memorandum is necessary in view of

the fact that there are erroneous statements, both of fact and law, contained in respondent's brief.

1. On page 21 of respondent's brief, the attorneys for the Commission question petitioner's good faith in bringing this matter for review to the United States Court of Appeals for the Ninth Circuit. Such statement is uncalled for. The petitioners are merely exercising their right to a court review of the Commission's entry of the Cease and Desist Order, which they have a perfect right to do.

Counsel for the Commission need not act surprised at the taking of such an appeal by the petitioners. This, for the reason that each of the petitioners in their answers expressly reserved the right of a hearing with oral argument and the filing of briefs before the Commission as to what order, if any, should be issued upon the facts which were admitted in the answer and further reserved the right in said answers to review the same in the Circuit Court of Appeals and/or the Supreme Court of the United States. We object to the inference of lack of good faith or breach of an agreement not to appeal.

2. On pages 23 and 24, counsel for the Commission make statements concerning the history and progress of this case which are not supported by the printed transcript of the record. They cite as authority for such statements a typewritten transcript of the reporter which was neither made a part of the record nor a copy thereof served on any of the petitioners. The court reporter's transcript of meetings or hear-

ings was not made part of the transcript of the record in this United States Court of Appeals and therefore is not properly a part of the record and reference to the same or quotations from it are improper and should be disregarded by this court.

Likewise counsel for the Commission have attached to the back of their brief, Appendix A, a memorandum proposing disposition, which again is not part of the printed transcript of record. If counsel wished to have certain documents or court reporter's records included in the transcript of record they should have designated the same and had it included therein. Failing to do so, however, the same is not part of the record and cannot be considered by this court in connection with the appeal.

3. Counsel for the Commission have devoted twenty pages of their brief in an effort to support their claimed proposition that they may rely upon a presumption of guilt in lieu of sustaining the burden of proof which would naturally rest upon them under the general denial contained in the answers of petitioners. Respondent's arguments in this respect are basically unsound.

Respondent's amended complaint was issued May 19, 1949 (Tr. 35) and alleges violations by the various petitioners "for a substantial portion of the period of time since prior to January, 1936" (Tr. 51). This petitioner and others in their answers admit violations "for a substantial part of the period between May, 1935 to August 1, 1941, and not otherwise and except to the extent of such admission denies

all of the material allegations of fact set forth in the amended complaint * * *" (Tr. 78).

No testimony of any kind was taken.

Respondent's counsel, page 22 of their brief, refer to petitioner's self-serving declarations in its answer. Petitioner's general denial in its answer is improperly labeled by respondent's counsel as a "self-serving declaration." By petitioner's denying any violations subsequent to August 1, 1941, counsel for respondent had the burden of proof of submitting evidence to sustain the allegations of the amended complaint. No *evidence* of any kind was submitted to prove any violations by this petitioner or other petitioners subsequent to August 1, 1941. Counsel for the respondent failed to sustain the burden of proof cast upon it by the law and cannot now complain of their own failure.

It must be remembered that the petitioners did not set forth in their answers any affimartive matter nor did they set forth an affirmative defense which would have put upon them the burden of proof of sustaining such affirmative defense. On the contrary petitioners admitted violations up to August 1, 1941, and not otherwise which constitutes nothing more than a general denial as to any violations subsequent to August 1, 1941, and places upon respondent the burden of proof of sustaining the allegations of its amended complaint. Respondent failed to sustain its burden of proof.

Even the rules of practice for the Federal Trade Commission as amended to March 1, 1951, places the

burden of proof upon the respondent in this case. Rule 18(a) reads in part as follows::

> "Counsel supporting the complaint shall have the general burden of proof and the proponent of any factual proposition shall be required to sustain the burden of proof with reference thereto."

This Rule 18(a) (Title 15, U.S.C.A., page 143) places the burden of proof upon counsel supporting the complaint. Petitioner herein put forward no affirmative factual propositions but merely entered its general denial as to any violation subsequent to August 1, 1941.

The cases cited by respondent commencing at the bottom of page 31 of their brief to support the theory that a conspiracy once shown is presumed to continue until the contrary is shown has been analyzed by us. Some of the cases cited do make such a statement but a careful reading of those cases will show that they are not applicable or are not in point with the facts of the present case. In the cases cited, counsel in support of the complaint had sustained the burden of proof in showing a conspiracy existed during the period of time in queston. In these cases there was evidence and proof to sustain the burden of proof cast up the attorneys in support of the complaint. In the present case there was no evidence or proof of any kind of any violation subsequent to August 1, 1941, and consequently counsel in support of the complaint have not sustained their burden of proof.

Counsel in support of the complaint attempt to segregate and divide petitioner's answer by using that

part which admits violations prior to August 1, 1941, for their own use and declaring as a self-serving statement the general denial set forth in such answer as to any violations subsequent to August 1, 1941. This respondent cannot do under the authorities. Bancroft's Code Pleading, Volume 1, page 635, Section 436, reads as follows:

> "In construing an admission in a pleading the whole thereof must be taken together. It must be taken as an entirety and any qualifying clauses included in it. Moreover, admissions must be construed in the light of the context of the whole pleading."

Again in Bancroft's Code Pleading, Section 694, page 976, it is stated:

> "Inasmuch as a general denial has the effect of putting in issue every material allegation constituting the cause of action alleged, it casts upon the plaintiff the burden of establishing by his evidence the presence of every element of it and hence his right to recover; and this burden continues to the close of the case. It puts the plaintiff upon proof of all the facts necessary to entitle him to recover, and not merely of every fact alleged but all implications and conclusions arising out of those facts."

4. Counsel for respondent on page 37 of their brief have set forth a quotation from the case *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F.(2d) 321, but have omitted from the very center of such quotation the following pertinent words:

> "Ordinarily the Commission should enter no order where none is necessary. This practice should include cases where the unfair practice has been discontinued."

The omitted portion of the quotation is very pertinent to this case and it is respectfully submitted that the omitted two sentences are determinative of this case. There is no evidence in this record of any violation occurring or continuing after August 1, 1941. The presumption is against an unlawful act rather than its existence. Respondent was content to submit this proceeding upon the pleadings only and without evidence with the pertinent part of the pleading containing a very precisely worded and specifically qualified admission that certain facts existed up to and not later than August 1, 1941, and specifically stating that those facts did not exist after that date. Respondent at that time made the deliberate choice of proceeding under that exact record. Respondent would now gratuitously breathe into the record an assumption that something exists which the record shows was precisely and absolutely denied and must be taken in this record as non-existent. Respondent's order cannot be justified by assumptions outside the record.

We, therefore, respectfully submit that on the basis of the printed record and the authorities cited in petitioner's opening and reply brief, this court should enter its decree setting aside the cease and desist order as entered by the Federal Trade Commission.

Respectfully submitted,

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